Volume 6 | Issue 1 Article 6

1999

Viewpoint Discrimination in the Military Context: Defining the Difference Due to the Military Honor and Decency Act of 1996 in General Media Communications, Inc. v. Cohen

Dirk Simpson

VIEWPOINT DISCRIMINATION IN THE MILITARY CONTEXT: DEFINING THE DEFERENCE DUE TO THE MILITARY HONOR AND DECENCY ACT OF 1996 IN *GENERAL MEDIA COMMUNICATIONS, INC. v. COHEN*

I. INTRODUCTION

Freedom of speech is so fundamentally essential to the preservation of a stable government that the government itself is generally prohibited from interfering with it.[1] But the power of Congress to "raise and support Armies" under Article I, Section 8 of the Constitution is also critical to the preservation of our liberties.[2] In cases of

1. The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. Although the right is fundamental, it is not absolute. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("[T]he character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic."). The free expression of ideas is subject to restriction in order to protect the state from destruction or from serious political, economic or moral injury. *See id.* Nevertheless, a state's valiant attempt to ensure stable government will be closely scrutinized by a court, and regulations restricting free speech are frequently found unconstitutional. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 397 (1989) (holding Texas' interest in preventing breaches of peace did not justify defendant's conviction for violation of flag desecration statute when he burned American flag at protest rally). The Johnson Court reassured that a principal "function of free speech under our system of government is to invite dispute." *Id.* at 408 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)). The Court explained that freedom of speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Id.* Espousing the principles of free speech on behalf of the Court, Justice Brennan announced:

> The way to preserve the flag's special role is not to punish those who feel differently about these matters . . . . [A]nd, precisely because it is our flag that is involved, one's response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity of the flag that burned than by . . . according its remains a proper burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Id. at 419-20.

2. *See* United States v. Brown, 45 M.J. 389, 397 (1996) (stating that military must defend national security and project international power). "The heart of a free society depends upon national security and the ability to project power worldwide." *Id.* Consequently, the role the United States assumes in international politics determines the security of the nation. *See id.* "In one sense, a nation's security is not only dependent upon its reputation for power, but its willingness to project power to preserve peace. Peace and power are not mutually exclusive but may be considered as part of a continuum." *Id.*

conflict between competing constitutional interests such as these, courts have favored the military matters.[3] It is well settled that the

---

In the name of national security, the judiciary has previously upheld military policies that were clearly discriminatory. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 214 (1944) (upholding military regulation placing Japanese-Americans in internment camps due to security concerns during World War II).

3. For a comprehensive survey of judicial deference to the military, *see* Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3 (1980) (providing excellent survey of military deference). Courts often subordinate the right to free speech to the military's need to maintain discipline. *See id.* This deferential standard has been called the doctrine of "military necessity." *Id.* Commentators have referred to this practice as affording "substantial deference" to internal military matters. *See* Thomas R. Folk, *Military Appearance Requirements and Free Exercise of Religion*, 98 MIL. L. REV. 53, 75 (1982).

See, e.g., Parker v. Levy, 417 U.S. 733, 733 (1974) (prioritizing military concerns over free speech). In *Levy*, a commissioned Army medical officer refused to train Special Forces personnel and instructed enlisted men to disobey orders to go to Vietnam. *See id.* at 737. Levy was convicted by court-martial for conduct unbecoming an officer and a gentleman. *See id.* Levy insisted that his remarks were protected by the First Amendment. *See id.* In *Levy*, the Supreme Court rejected this claim and stated that "a commissioned officer publicly urging enlisted personnel to disobey orders which might send them into combat" is "unprotected under the most expansive notions of the First Amendment." *Id.* at 761.

The Court did not directly consider whether Levy's remarks created any particular degree of danger to military discipline. *See Levy*, 417 U.S. at 761. Instead, it cited with approval the Court of Military Appeals' doctrine that speech which may be protected in the civilian community may not be protected in the military context if it undermines the effectiveness of response to command. *See id.* at 760-61. In the civilian context, Levy's statements could not be penalized unless they created danger of imminent disorder. *See generally* United States v. Wilson, 33 M.J. 797, 799 (1991) (holding speech that is protected in civil population may nonetheless undermine effectiveness of response to command and is not protected in military); United States v. Priest, 21 U.S.C.M.A. 564, 570 (1972) (holding that speech that is tolerable in civilian context may not be tolerable in military context if it creates clear and present danger); United States v. Gray, 20 U.S.C.M.A. 63 (1970) (holding that speech in military that promotes disloyalty to United States is not protected); Burns v. Wilson, 346 U.S. 137, 140 (1953) (holding that military law is separate from federal law and rights are preconditioned on unique needs of military). *Compare Levy*, 417 U.S. at 760-61 *with* Brandenberg v. Ohio, 395 U.S. 444, 447-49 (1969) (holding that speech is protected until directed to inciting imminent lawless action likely to produce such action).

Restraints on free speech in the military context also extend to expressive conduct. *See* United States v. O'Brien, 391 U.S. 367, 367 (1968). The Supreme Court has prohibited such conduct if it conflicts with the military's needs. *See id.* at 367. In *O'Brien*, the Supreme Court upheld a civilian's conviction for burning his Selective Service registration card in a political demonstration. *See id.* at 386. The Court relied on the administrative and practical importance of draft cards in quickly and effectively preparing to defend the nation. *See id.* at 381. The Court first confirmed that when actions involve both speech and non-speech factors, "a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. The Court then evaluated the constitutionality of the regulation based upon four requirements:

(1) whether the regulation is within the constitutional power of Congress; (2) whether the regulation advances a meaningful or significant governmental interest; (3) whether the purpose of the regulation is "unrelated

constitutional protections granted by the Bill of Rights are available to the military only to a limited extent compared to their civilian counterparts.[4] The Supreme Court has justified this difference in treatment because of the military establishment's unique need to maintain duty and discipline necessary for national security.[5] Based on these considerations, the Court has indicated that the military can restrict the constitutional rights of its members to a greater extent than is permissible in a civilian context.[6]

---

to suppressing free expression"; and (4) if the regulation does restrict free speech, whether it does so in the least suppressive way possible. *O'Brien*, 391 U.S. at 377.

Under this analysis, the *O'Brien* Court upheld the government regulation prohibiting the destruction of draft cards, finding that it did not violate O'Brien's right to free speech. *See id.* at 377.

4. *See Levy*, 417 U.S. at 760-61 (providing less protection to speech in military). These limitations apply not only to strategic defense matters such as the protection of sailing dates and location of troops, but also to that part of the military mission that prepares forces "to fight or be ready to fight wars should the occasion arise." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

"The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the nation itself." *Priest*, 21 U.S.C.M.A. at 570. Speech that would normally be protected in the civilian context may not be protected in the military context because it undermines the military effectiveness. *See id.*

5. *See Levy*, 417 U.S. at 760-61. "Society has long treated the military as a separate community, distanced from civilian society by its elusive ideals, rigid standards of conduct, and unique duty to protect national security." Alicia Christina Almeida, Note, Thomasson v. Perry: *Has the Fourth Circuit Taken "Don't Ask Don't Tell" Too Literally?*, 75 N.C. L. REV. 967, 967 (1997); *see also* Chappell v. Wallace, 462 U.S. 296, 300 (1983) (stating no military organization can function without strict discipline and regulation that is unacceptable in civilian setting); Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) (stating military necessity makes demands on its personnel "without counterpart in the civilian life"); James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 177 (1984) (discussing effect of military's separation from common society on soldier's constitutional rights). For a complete discussion of the special needs of the military and the compromising of constitutional protections, *see generally* David A. Schlueter, *Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393, 393 (1994) (discussing compromising sexual expression); William A. Woodruff, *Homosexuality and the Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, 121 (1995) (discussing sexual expression in military); Almeida, *supra* (discussing sexual expression in military); Felice Wechsler, Comment, *Constitutional Law*-Goldman v. Weinberger: *Circumscribing the First Amendment Rights of Military Personnel*, 30 ARIZ. L. REV. 349, 349 (1988) (discussing compromising freedom of religion).

6. *See Levy*, 417 U.S. at 759. Although the right to First Amendment free speech does not stop at the gates of a military base, Congress has a legitimate interest in restricting speech in order to uphold the military's image and core values of honor, professionalism and discipline. *See id.* The Supreme Court announced that free speech is not protected under the First Amendment if the speech undermines the effectiveness of the response to command. *See id.* Regarding the military, the test is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear and present danger to the loyalty, discipline, mission, or morale of the troops. *See, e.g.*, United States v. Hart-

The Court has just as clearly indicated that the military's discretion is not completely unfettered by constitutional considerations and judicial review.[7] Consequently, the Court has sought to accommodate the competing interests of military effectiveness and constitutional rights under a principle of deference.[8] Although the Court has repeatedly invoked the deference standard, it has not adequately described its application.[9] As a result, extensive debate surrounds whether particular departures from constitutional norms are warranted.[10] In particular, there is confusion as to what degree of deference is due when the military restricts the First Amendment right to free speech by enacting a viewpoint-based regulation. Consequently, the military's decision to censor sexual expression by enacting the Military Honor and Decency Act,[11] has evoked debate.[12]

---

wig, 39 M.J. 125, 128 (1994) (stating that "clear and present danger" standard requires different application in military context); *Priest*, 21 U.S.C.M.A. at 570 ("speech that is protected in the civilian population may . . . undermine the effectiveness of response to command.").

7. *See* Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (holding registration laws excluding women do not violate equal protection, yet recognizing due process requirements do apply in military context); *Levy*, 417 U.S. at 751 (rejecting First Amendment challenge to court-martial conviction for urging fellow service personnel to disobey orders, yet noting that service personnel maintain most constitutional rights while in armed forces); Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962) (stating that "citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes").

8. For a discussion of judicial deference to the military, see *infra* notes 105-80 and accompanying text. This deferential standard had been called the doctrine of "military necessity." For a complete survey of military deference, *see* Levine, *supra* note 3, at 3. This practice has been referred to as affording "substantial deference" to internal military matters. *See* Folk, *supra* note 3, at 75.

9. *See Rostker*, 453 U.S. at 112 (1981) (Marshall, J., dissenting) ("[T]he Court substitutes hollow shibboleths about 'deference to legislative decisions' for constitutional analysis."). *See generally* Mary Jo Donahue, *First Amendment Rights in the Military Context: What Deference is Due?—Goldman v. Weinberger*, 20 CREIGHTON L. REV. 85, 101 (1987) (noting that Supreme Court has not fashioned coherent test to incorporate dual policies of judicial deference and constitutional responsibility); Susan A. Vallario, Note, *Goldman v. Weinberger: Deference or Abdication?*, 7 PACE L. REV. 531, 533 (1987) ("[T]he *Goldman* majority has abdicated its role by implicitly abandoning substantive interest-balancing in favor of absolute deference to military judgement."); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights To Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 865 (1987) ("A review of the development of [F]irst [A]mendment rights for the military shows that what began as a weak but substantive review has degenerated into virtually no review at all.").

10. *See, e.g.*, Barney F. Bilello, Note, *Judicial Review and Soldiers' Rights: Is The Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465 (1988) (arguing that Supreme Court's failure to provide discernable parameters, rather than Court's deferential review, presents problems).

11. 10 U.S.C. § 2489a (1996).

12. For a discussion of this debate, see *infra* notes 13-14 and accompanying text.

Participants in this debate question whether the military should censor matters of sexual indecency. One commentator has suggested that "no longer having wars to fight, the military has decided to fight the devil instead."[13] Another commentator has questioned whether the military is becoming too much like the Vatican.[14] While such commentary reflects the ever increasing involvement the military has taken with respect to the constitutional rights of its members, this has not always been the case.[15] For example, during World War II, the military focused on morale, not morals.[16] Ironically, sexual images actually played an important part.[17] For example, the "pin-up girl" was everywhere, doing her part to boost

13. Bill Press, *The American Ayatollahs' War Against Love*, TIMES UNION (Albany, N.Y.), June 9, 1997, at A7; *see also* Ellen Goodman, *Pentagon Theme When Saints Come Marching In*, FLORIDA TODAY, June 13, 1997, at 11A ("The new military theme song is no longer 'From the Halls of Montezuma' but 'When the Saints Come Marching In.'").

14. *See* E.J. Dionne Jr., *Military's Sex War Not So Different From Society's*, THE RECORD (Northern N.J.), June 12, 1997. In 1951, at the request of the Pentagon, Congress adopted Article 134 of the Uniform Code of Military Justice, which criminalizes adultery in the military. *See* Press, *supra* note 13. The statute was aimed at providing discipline through respect for superiors. *See id.* Congress intended to prevent the breakdown of order on a base resulting from an adulterous affair between two military personnel. *See id.* Although the statute was not intended to govern affairs between military personnel and civilians, it did. *See id.* This, however, has been the result. *See id.* Recently, a distinguished high ranking general resigned from active duty after facing adultery charges for having sex with a civilian five years earlier. *See id.*

15. *See* James R. Petersen, *Playboys's History of the Sexual Revolution: Part V, 1909-1949*, 44 PLAYBOY, Nov. 1, 1997.

16. *See* Petersen, *supra* note 15 *passim*. During World War II, "the roar of the war machine tended to drown out prudes and puritans, but these people still walked the perimeter." *Id.* at 17. The National Organization for Decent Literature (NODL), an organization notorious for censoring sexual expression, waged a campaign to ban all magazines that did "(1) glorify or condone reprehensible characters or reprehensible acts; (2) contain sexually offensive material; (3) feature illicit love; (4) carry illustrations indecent or suggestive; or (5) advertise wares for the prurient minded." *Id.* at 20. The NODL recruited base chaplains to examine base newsstands and report magazines found offensive by NODL to the base commander. *See id.* Most base commanders, however, shrugged off these complaints. *See id.*

17. *See* Petersen, *supra* note 15 *passim*. Gary Valant, an art historian fascinated by the particular kind of sexual expression called bomber art, explains the impulse behind this image:

> The origin of nose art goes back to some ancient time when the first proud charioteer decorated his vehicle so that it would be distinguishable from others. The desire to personalize an object, a machine, to make it unique among the multitude, is basic to man's nature. Place man under great stresses, give him a very uncertain future, and this desire can become an obsession. So it is in war, and with the machines of war. A thousand B-17's identical in every way roll off the assembly line and fly to an uncertain fate, but each one can be different. The difference is not in the tail number. Those are for record keepers and ribbon clerks. The difference is in the imagination and talent of the crew. Few crew mem-

morale.[18] As more than one soldier commented, the pictures "give us guys a good idea of what we are fighting for."[19]

Today, however, the popular myth that hormones rage unrestricted in the military is changing.[20] The military's old system is not quietly accepted.[21] It has come under scrutiny from both outside and inside the armed forces.[22] For example, offensive behavior that may have once been punished by a slap in the face, is

---

bers would talk about 247613 or 34356, but many tales would be told about Sack Time or the Dragon Lady.

Id.

18. *See* Petersen, *supra* note 15, at 13. An estimated two million servicemen ended up with the still shot of Betty Grable in a bathing suit. *See id.* at 14. Rita Hayworth posed in lingerie for *LIFE* and became another favorite. *See id.* The 1944 *Esquire* pin-up calendar sold 2.5 million copies. *See id.* Morever, despite the rationing of paper, which meant that magazines were printed in miniature versions, the military insisted on receiving these calendars in full size. *See id.*

Soldiers placed pin-ups on the walls of their barracks, inside tanks and bombers, inside their helmets, on palm trees next to their shaving mirrors and in footlockers. *See id.* The code breakers kept a huge collection of photos under glass on their desks. *See id.* Some pin-ups were even attached to official intelligence reports to insure that they would be read. *See id.*

19. *Id.* One commentator suggested that the pin-up had a special status for many:

> The extensive personal testimony to the emotional impact of World War II suggests that what men and woman were fighting for had less to do with abstract notions of freedom or patriotism than with the need to protect personal values represented by sweethearts, wives and families. Sex, therefore, played an extensive role in the war experience. Whether with its pin-ups of Hollywood stars, well-thumbed pictures of the girl back home, Rosie the Riveter, the archetypal female factory worker, or women pilots, World War II acquired an undeniable feminine aspect.

Id.

20. *See* Don Boyett, *Military's Morality on Target, The Rules at Times Get Broken, But Discipline Has a Purpose and Society Should Reflect on That*, ORLANDO SEMINOLE, June 8, 1997, at K10 (suggesting moral constraints benefit military).

21. *See id.* Education provides the most recent background for challenges to military policy. Women have begun to contest the right of state funded military schools to exclude females in the name of tradition and fraternity. *See* United States v. Virginia, 518 U.S. 515, 515 (1996) (challenging Virginia Military Institutes's exclusion of females under Equal Protection Clause); Faulkner v. Jones, 51 F.3d 440, 440 (4th Cir. 1996) (challenging Citadel's gender-based exclusionary policies as violating Equal Protection Clause).

While women now constitute a significant portion of the armed services, they still face many obstacles, including sexual harassment and gender discrimination. *See, e.g.*, James W. Crawley, *Sex Barrier Lurks Below the Surface: First Female Submariner Is Left High and Dry*, SAN DIEGO UNION-TRIB., July 22, 1995, at A1 (discussing military's refusal to allow female officer to serve on an all-male submarine); Jackie Spinner, *Navy, Air Force to Review Explanation of Sexual Harassment Policy to Personnel*, WASH. POST, Nov. 14, 1996, at A9 (recounting how rape reports have led military to review sexual harassment policies).

22. *See* Boyett, *supra* note 20, at K10.

now formally punished through sexual harassment laws.[23] As a result, the military is currently reevaluating its policies and procedures.

In *General Media Communications, Inc. v. Cohen*,[24] the Court of Appeals for the Second Circuit addressed whether Congress exceeded its constitutional authority by enacting the Military Honor and Decency Act which banned the sale or rental of sexually explicit materials on military property.[25] Part II of this Note examines the text of the challenged Act.[26] Part III provides the legal framework the court utilized in making its decision.[27] It examines whether the Act is an impermissible viewpoint-based regulation and analyzes whether the principle of military deference provides an exception to permit viewpoint-based discrimination in the military forum. Part IV reviews the court's reasoning.[28] Part V offers a critical analysis of the court's rationale.[29] Finally, Part VI discusses the impact of the decision and suggests that the court should have afforded the Act less deference.[30]

II. FACTS

The Military Honor and Decency Act of 1996[31] (the "Act"), prohibits "the sale or rental of sexually explicit material on prop-

23. *See* Richard J. Chema, *Arresting 'Tailhook': The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. Rev. 1, 27 (1993) (discussing prevalence of sexual harassment in military).

24. 131 F.3d 273 (2d Cir. 1997).

25. *See id.*

26. For a discussion of the Act's text, see *infra* notes 31-38 and accompanying text.

27. For a discussion of the legal framework utilized by the court, see *infra* notes 45-225 and accompanying text.

28. For a discussion of the court's reasoning, see *infra* notes 226-59 and accompanying text.

29. For a discussion of the court's reasoning and a critical analysis of that rationale, see *infra* notes 260-89 and accompanying text.

30. For a discussion of why the court should have afforded the Act less deference, see *infra* note 290 and accompanying text.

31. 10 U.S.C. § 2489a (1996). The Act became effective on December 22, 1996 and provides in pertinent part:

> (a) PROHIBITION OF SALE OR RENTAL. The Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense.
> (b) PROHIBITION OF OFFICIALLY PROVIDED SEXUALLY EXPLICIT MATERIAL. A member of the armed forces or an employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental of sexually explicit material to another person.
> (c) REGULATIONS. The Secretary of Defense shall prescribe regulations to implement this section.

erty under the jurisdiction of the Department of Defense," which includes military exchanges.[32] The Act bans audio and video recordings and periodicals with visual descriptions, produced in any medium, but does not ban purely written material.[33] Significantly, the Act does not ban all sexually explicit material in military exchanges.[34] Nor does it ban all depictions of nudity.[35] Instead, it bans only the distribution of sexually explicit material, "the dominant theme of which depicts or describes nudity . . . in a lascivious way."[36] The Act defines "lascivious" as "lewd and intended or designed to elicit a sexual response."[37] The regulations which accompany the Act instruct that "[m]aterial shall not be deemed sexually explicit because of any message or point of view expressed therein."[38]

(d) DEFINITIONS. In this section:
(1) the term "sexually explicit material" means an audio recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way.

Id.

Pursuant to § 2489a(c) the Department of Defense issued regulations implementing the Act that also became effective on December 22, 1996. *See* General Media Communications, Inc. v. Cohen, 131 F.3d 273, 276 at (1997). The Regulations defined the following pertinent definitions:

1. MATERIAL. An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.
2. SEXUALLY EXPLICIT MATERIAL. Material the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.
3. DOMINANT THEME. A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.
4. LASCIVIOUS. Lewd and intended or designed to elicit a sexual response.

Id. at 276-77.

32. *See* 10 U.S.C. § 2489a(a). The Act further specifies that no officer or employee of the Department of Defense is to sell, rent or otherwise be compensated for providing "sexually explicit material to another person." *Id.* at § 2489a(b). Significantly, only the sale or rental of sexually explicit material on military property is prohibited by the Act. *See General Media*, 131 F.3d at 277. Possession of such material on military property is not prohibited. *See id.* Therefore, military personnel may buy such material off military property or order it through the mail. *See id.*

33. *See* 10 U.S.C. § 2489a(a).

34. *See id.*

35. *See id.*

36. *Id.*

37. *General Media*, 131 F.3d at 277.

38. *Id.* The regulations also established the "resale Activities Board of Review" (the "Board"). *See id.* The Board reviews material offered for sale or rental on military property and determines whether such material is "sexually explicit." *Id.* Any material found to be sexually explicit must be withdrawn from the military retail exchanges. *See id.*

The government argued that the sale of lascivious materials in military exchanges could send the message that the military approves or endorses these materials.[39] Sale of such materials could tarnish "the military's image of honor, professionalism, and proper decorum."[40] The government argues that "[t]he military also encourages its personnel to 'lead by example' and to display the highest form of personal and professional conduct."[41] This policy, the government argues, could be undermined if military personnel believe that military commanders approved the sale of sexual materials at military exchanges.[42]

General Media Communications, Inc. (GMC), publishers of Penthouse magazine, and other plaintiffs engaged in similar industries, challenged that the Act infringed on the First Amendment right to free speech.[43] The district court found that the Act was unconstitutional and granted the plaintiffs injunctive relief.[44] The government appealed the decision to the United States Court of Appeals for the Second Circuit.

---

39. *See General Media,* 131 F.3d at 283. The Act prevents the sale of sexually lascivious materials at military exchanges:

> Military exchanges may include retail stores, garages, restaurants, beauty shops, laundry facilities, newsstands, storage facilities, and recreational facilities. The exchanges are authorized to sell toiletries, stationary, clothing, jewelry, housewares, sporting goods, and automotive products, in addition to books, periodicals, and audio and video tapes.

Id. at 275 n.1.

40. *Id.* at 284.

41. *Id.*

42. See *id.* Such an assumption would be true in the Navy, where resale regulations specify that "adult" magazine titles stocked by the exchange are to be "coordinated with the base commanding officer." *General Media,* 131 F.3d at 283-84 (citing 4 Navy Resale Manual § 4108(6)(a)(1)).

43. *See* General Media Communications, Inc. v. Perry, 952 F. Supp. 1072, 1075 (S.D.N.Y. 1997) [hereinafter *General Media I*]. GMC also claimed that the Act violated their equal protection rights under the Fourteenth Amendment because the ban affected only sexually explicit materials in magazines and video format. *See id.* GMC further alleged that the vague wording of the statute infringed on their due process rights under the Fifth Amendment. *See id.* GMC sought declaratory and injunctive relief under 28 U.S.C. §§ 1331 and 2201. *See id.*

For discussions of the First Amendment-Equal Protection intersection, *see* Harry Kalven Jr., *The Concept of the Public Forum: Cox v. Louisiana,* 1965 SUP. CT. REV. 1, 29-30; William W. Van Alstyne, *Political Speakers at State Universities: Some Constitutional Considerations,* 111 U. PA. L. REV. 328, 337-39 (1963).

44. *See General Media I,* 952 F. Supp. at 1071, 1083. The United States District Court for the Southern District of New York found that the Act banning sales and rental of pornographic material was unconstitutional under the First, Fifth and Fourteenth Amendments. *See id.*

III. BACKGROUND

The *General Media* decision is best viewed by analyzing the two conflicting constitutional doctrines involved: the doctrine of free speech and the doctrine of deference to military judgment in military matters. Although these concepts evolved through separate lines of cases they converged in the Second Circuit's *General Media* decision. Part A of this section discusses the doctrine of free speech.[45] Specifically, Part A observes that content-based speech restrictions have been analyzed based on the type of forum in which speech occurs.[46] Next, Part A distinguishes between content and viewpoint discrimination.[47] Part B examines viewpoint discrimination in the military forum.[48] Part B examines the general judicial policy of deference to the military and reviews whether this deference will override the general prohibition against viewpoint discrimination in the military forum.[49]

A. The Doctrine of Free Speech

1. *Balancing Restrictions on Speech*

In America, Communists may speak freely,[50] the Klu Klux Klan may promulgate its ideas[51] and the Nazi party may march through a city with a large Jewish population.[52] The bedrock principle underlying the First Amendment is that the government may not proscribe the expression of an idea simply because the idea is offensive or disagreeable.[53] Twenty-five years ago, the Supreme Court an-

45. For a discussion of the doctrine of free speech, see *infra* notes 50-103 and accompanying text.

46. For a discussion of how content-based restrictions on free speech are analyzed, see *infra* notes 50-83 and accompanying text.

47. For a discussion of the distinction between content-based and viewpoint-based restrictions, see *infra* notes 84-103 and accompanying text.

48. For a discussion of viewpoint discrimination in the military forum, see *infra* notes 104-225 and accompanying text.

49. For a discussion of the judicial policy of deference to the military and whether this deference will override the general prohibition against viewpoint discrimination in the military forum, see *infra* notes 105-225 and accompanying text.

50. *See* Dennis v. United States, 341 U.S. 494, 494 (1951) (permitting teaching of Communist ideology).

51. *See* Brandenberg v. Ohio, 395 U.S. 444, 444 (1969) (allowing Klu Klux Klan right to express views).

52. *See* Collin v. Smith, 578 F.2d 1197, 1197 (7th Cir. 1978) (permitting Nazi party demonstration).

53. *See* Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 655-63 (1991). Each individual should decide for themselves which ideas and beliefs deserve expression by choosing among those available in the free market of ideas. *See id.* Justice Holmes' dissenting opinion in Abrams v. United States, expounds the marketplace of ideas theory. *See* Abrams v. United

nounced that "above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[54] The Court, nevertheless, has frequently upheld content-based restrictions on speech.[55] The Court has reconciled such holdings in two ways.

First, the Court has held that some speech is categorically excluded from protection under the First Amendment. In *Chaplinsky v. New Hampshire*,[56] the Court announced that: "[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems."[57] Thus, we do not ask whether particular obscene publications are protected by the First Amendment.[58] Obscenity is not the kind of expression that the "freedom of speech" intends to protect.[59] Laws restricting the availability of obscenity are therefore not restricted by the First Amendment.[60]

States 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Holmes stated, "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out. That at any rate is the theory of our Constitution." *Id.* (Holmes, J., dissenting). Holmes' marketplace of ideas theory rose from deep currents in British political thought. *See* JEROME A. BARRON ET AL., CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 890-92 (1996). In the seventeenth century, John Milton advocated the same *laissez-faire* clash of ideas propounded by Holmes in *Abrams*. *See id.* (citing JOHN MILTON, AREOPAGITICA (1644)). The English political economist John Stuart Mill expressed similar ideas in the nineteenth century. *See id.* (citing JOHN STUART MILL, ON LIBERTY (1859)).

The viability of the marketplace of ideas theory has been criticized by several commentators. *See generally*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964, 976 (1978); Jerome Barron, *Access to the Press - A New First Amendment Right*, 80 HARV. L. REV. 1641, 1648 (1967); Herbert Marcuse, *Repressive Tolerance* in R. WOLFF, B. MOORE & H. MARCUSE, A CRITIQUE OF PURE TOLERANCE 110 (1965); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 617 (1982). Marcuse believes that the free discussion of ideas is so distorted by economic reality that the dissenting idea or viewpoint does not really have a fair chance: "Under the rule of monopolistic media - themselves the mere instruments of economic and political power - a mentality is created from which right and wrong, true and false are predefined whenever they effect the vital interests of society." Marcuse, *supra*, at 110.

54. Police Dep't. v. Mosley, 408 U.S. 92, 95 (1972).

55. For a discussion of valid content-based restrictions, see *infra* notes 56-65 and accompanying text.

56. 315 U.S. 568 (1942).

57. *Id.* at 571-72 (1942).

58. *See* BARRON, *supra* note 53, at 1653. "Unprotected areas include obscenity, fraudulent misrepresentation, defamation, advocacy of imminent lawless behavior, 'fighting words' and child pornography." *Id.*

59. *See id. See generally* New York v. Ferber, 458 U.S. 747, 747 (1982) (addressing restrictions on pornographic depictions of children); Miller v. California, 413 U.S. 15, 15 (1973) (addressing restrictions on obscene books and magazines).

60. *See Miller*, 413 U.S. at 24. The *Miller* test identifies material which may be banned as obscenity. *See id.* To be deemed obscene, this test requires that:

Second, the Court has upheld some content-based restrictions under a "balancing" test.[61] This balancing approach may be expressed as a formula as in the case of the clear and present danger doctrine.[62] The balancing approach may also involve the courts evaluation of content-based legislation and an examination of the legislation's context and the government's purpose.[63] This evaluation usually requires the Court to weigh the government interest in maintaining the regulation against the burden of the legislation on free speech.[64] Cases using the public forum concept reflect this type of balancing.[65]

In *Perry Education Association v. Perry Local Educators Association*,[66] the Court developed the conceptual framework for public

---

(1) the "'average person applying contemporary community standards' would find that 'the work taken as a whole, appeals to the prurient interest;'" (2) the work "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law" and (3) the work, "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*

The *Miller* test's first prong is directly adopted from *Roth v. United States*. *See id.* (citing Roth v. United States, 345 U.S. 476 (1957)). In *Roth*, the Court defined the term "prurient" as "having a tendency to excite lustful thoughts" from the "average person" whose attitudes reflect current community standards. *See Roth*, 345 U.S. at 487-89.

To qualify as obscene, material must satisfy all three prongs of the Miller test. *See Miller*, 413 U.S. at 24. The Military Honor and Decency Act, challenged in *General Media*, did not mention "community standards," "average person" or "lacking serious literary, artistic, political or scientific value." *See* 10 U.S.C. § 2489a(a) (1997). Therefore, the Act restricted sexual materials that were not obscene under *Miller*. *See Miller*, 413 U.S. at 24. Had the Act solely restricted obscene materials, the military could have lawfully prohibited these sales. *See id.*

61. *See* BARRON, *supra* note 53, at 993-94.

62. *See id.*

63. *See* Lehman v. Shaker Heights, 418 U.S. 298, 302-03 (1974). The *Lehman* Court stated that the nature of the forum and the conflicting interests involved have remained important in determining the degree of protection afforded. *See id.* In *Lehman*, the Court held that advertising card space on a city's mass transit system was not a First Amendment forum, and that such advertising could be regulated on the basis of content. *See id.* The Court suggested that the case presented peculiar facts that differed greatly from the traditional settings where First Amendment values inalterably prevailed. *See id.* In particular, the Court differentiated *Lehman* on the basis that public bus passengers constituted a captive audience. *See id.*

64. *See id.* at 303. The *Lehman* court relied on a Lord Dunedin quote to support the proposition that the nature of the forum and the competing interests involved determine the degree of protection afforded speech. *See id.* In *M'Ara v. Magistrates of Edinburgh*, Dunedin noted, "[t]he truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place." 1913 Session Case 1059, 1073-74.

65. *See* Perry Educ. Ass'n. v. Perry Local Educators Ass'n., 460 U.S. 37, 45 (1983) (developing public-forum analysis).

66. 460 U.S. 37 (1983).

forum analysis.[67] The *Perry* Court explained that governmental property falls into one of three categories.[68] First, public streets, parks and other places which "by long tradition or by government fiat have been devoted to assembly and debate" are considered traditional public forums.[69] The second category is the designated public forum, "a place not traditionally open to assembly and debate, but which the State has opened for use by the public as a place for expressive activity."[70] In both traditional and designated forums that are fully open to the public, content-based regulations of speech are permissible only if "narrowly drawn to achieve a compelling governmental interest."[71] The third category of property is the non-public forum, which consists of all remaining public property.[72] In a non-public forum, the Court will likely uphold content-based regulations.[73] The government need only prove that the regulation is reasonable and not an effort to suppress the activity because of the speaker's views.[74] Justifying this relaxed standard, the *Perry* Court explained that "the State, no less than a private owner of property, has power to preserve property under its control for the use to which it is lawfully dedicated."[75]

The categorical forum approach predetermines outcomes by determining the standard of review.[76] Consequently, classifying the nature of the forum is extremely important. In classifying types of

67. *See id.* at 45.

68. *See id.* at 44-45 ("The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.").

69. *See id.* at 45.

70. *Id.* Although a state is not required to open a particular forum, once it does, the constitution forbids arbitrary exclusion. *See id.* The state, however, is not required to indefinitely retain the open character of the forum. *See id.*

71. *Id.* The same standards apply to "traditional public forums" and "designated forums." *Id.* In these forums, the government may not prohibit all speech. *See id.* Content-based prohibition must be narrowly drawn to effectuate a compelling state interest. *See id.; see also* Carey v. Brown, 477 U.S. 455, 463 (1980). The state may also enforce regulations of the time, place and manner of expression which "are content-neutral, are narrowly tailored to serve a significant government interest, and leave ample alternative channels of communication." *Perry Educ. Ass'n.*, 460 U.S. at 45.

72. *See id.*

73. *See id.*

74. *See id.*

75. *Id.* at 46 (citing Greer v. Spock, 424 U.S. 828, 836 (1976); Adderley v. Florida, 385 U.S. 39, 48 (1966)). The Court has explicitly stated that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *Id.* (citing United States Postal Serv. v. Greenburgh Civic Ass'n, 453 U.S. 114, 129 (1981)).

76. *See Perry Educ. Ass'n.*, 460 U.S. at 45.

forums, the Supreme Court examines the compatibility of the expressive activity with the normal use of the property.[77] A narrower, but increasingly dominant approach scrutinizes the government's intent.[78] Under this approach, the Court considers the compatibility of the expressive activity, the nature of the property and the relevant policies of the government.[79] The Court ascertains whether the government intended to designate the place a public forum.[80] A state creates a non-public forum when it reserves property for specific official uses.[81]

The Supreme Court has recognized that the military maintains an installation to train soldiers, not to provide a public forum.[82] Accordingly, "[a]lmost without exception, courts have categorized military bases as non-public forums."[83]

2. *Distinguishing Between Content-Based and Viewpoint-Based Restrictions*

While the government is sometimes permitted to enact content-based restrictions on speech, it may never enact viewpoint-based restrictions.[84] Basically, the government may not decide that

77. *See, e.g.*, Brown v. Louisiana, 385 U.S. 863, 863 (1966) (holding quiet sit-in protest in public library is constitutionally protected).

78. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 804 (1985).

79. *See id.*

80. *See id.*

81. *See id.*

82. *See* Greer v. Spock, 424 U.S. 828, 838 (1974) (upholding military regulations banning speeches, demonstrations, and distribution of partisan political literature on military base).

83. Shopco Distrib. Co. v. Commanding Gen., 885 F.2d 167, 172 (4th Cir. 1989). Likewise, military exchanges located on military property are non-public forums. *See Cornelius*, 473 U.S. at 805. Military exchanges exist to provide "authorized patrons with articles and services necessary for their health, comfort, and convenience and [to provide] a supplemental source of funding for [military moral, welfare, and recreational] programs." General Media Communications, Inc. v. Cohen, 131 F.3d 273, 280 (2d Cir. 1997). The exchanges are not public; in order to purchase items, patrons must show military identification. *See id.* "Only military personnel, their dependents, orphans, surviving spouses, and certain other affiliated personnel are admitted." *Id.* These limits suggest that the government did not intend to create a public forum. Although military exchanges are "engaged in commerce," they do not qualify as a traditional public forum. *Cf.* Lehman v. Shaker Heights, 418 U.S. 298, 303 (1974) (holding advertising space inside city bus not traditional public forum).

84. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 393 (1993) (denying religious group access to school property because it planned to discuss secular topic from religious perspective violated First Amendment); *Cornelius*, 473 U.S. at 812 (stating that viewpoint restrictions are unacceptable even in nonpublic forum where freedom of speech receives least protection); AIDS Action Comm. of Mass., Inc., v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 3 (1994) (stat-

some messages are superior to others.[85] The Supreme Court has indicated that the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[86] Government action that censors speech on the basis of viewpoint deprives people of ideas and artistic experiences that could contribute to their growth, skews public debate, retards democratic change and constricts human liberty.[87] Thus, constitutional prohibition against "viewpoint discrimination," and the jurisprudential pursuit of its converse, "viewpoint neutrality," arise from the most basic values underlying the First Amendment.[88]

Understanding the importance of "viewpoint neutrality" is relatively straightforward. It is, however, considerably more difficult to define the concept or to understand its application in the myriad contexts in which the government interacts with citizens.[89] Unfortunately, the Supreme Court has not clearly distinguished between viewpoint discrimination and the more generic concept of content discrimination.[90] The Court has, however, acknowledged that the distinction is not precise.[91] As a concept, content encompasses entire subjects of discourse regardless of the viewpoint expressed.[92] The Court's decision in *Burson v. Freeman*[93] illustrates this distinction. In *Burson*, the Court examined a law banning political campaigning within 100 feet of a polling place.[94] The Court deemed the ban content-based because it prohibited an entire class of

---

ing "transportation authority's decision not to run AIDS committee's ads while running ads for movie containing sexually explicit words and photographs" constituted impermissible viewpoint discrimination regardless of presence in non-public forum).

85. *See Cornelius*, 473 U.S. at 812.

86. Police Dep't. v. Mosley, 408 U.S. 92, 96 (1972).

87. *See* Cox v. Louisiana, 379 U.S. 536, 581 (1965) (Black J., concurring) ("[Viewpoint regulation is] censorship in a most odious form . . . ."). *See generally* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L. Q. 99 (1996); Redish, *supra* note 53, at 591; Williams, *supra* note 53, at 676-93 (contending First Amendment values include pursuit of truth, democracy's proper functioning, fulfillment of human potential, self-expression, tolerance, and encouragement of dissent).

88. *See* Heins, *supra* note 87, at 100.

89. *See id.*

90. *See id.*

91. *See* Rosenberger v. Rector and Visitors of the Univ. Of Va., 515 U.S. 819, 831 (1995).

92. For a discussion of the difference between content and viewpoint discrimination, see *infra* notes 93-103 and accompanying text.

93. 504 U.S. 191 (1992).

94. *See Burson*, 504 U.S. at 208.

speech (all campaign speech), but viewpoint-neutral because it did not ban particular political viewpoints.[95]

The Supreme Court has indicated that whether a restriction is content-based or viewpoint-based will depend on whether the restriction prohibits all viewpoints or whether the restriction favors certain viewpoints by suppressing others.[96] The subject of political speech provides a useful illustration of this point. Political speech, as a whole, is considered a subject matter and not a viewpoint because there is no distinctive viewpoint of politics.[97] The exclusion of the whole category of political speech would impoverish debate, but it would not skew debate because some political views would not gain unfair advantage over others.[98] Accordingly, the Supreme Court has characterized the exclusion of political speech as content-based regulation.[99]

In contrast, the Supreme Court has held that restrictions on religious expression constitute viewpoint-based discrimination.[100]

---

95. *See id.* at 198.

96. *See* Heins, *supra* note 87, at 121-22. Heins explains the viewpoint discrimination doctrine:

> The Court has repeatedly recognized that controversial political viewpoints are "the essence of First Amendment expression." The viewpoint neutrality rule is designed precisely to protect this "essence" by preventing government suppression of controversial or otherwise disfavored ideas. That purpose is ill-served, as the *Lamb's Chapel* and *Rosenberger* Courts recognized, if government may accomplish its goal by suppressing an entire category of viewpoints—be they religious, "political," "controversial," or "offensive." Speech that is controversial, that induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger, is precisely the speech most in need of constitutional protection. *Rosenberger*, which refused to permit government to "skew" public debate by disadvantaging whole categories of ideas, compels the conclusion that restrictions on speech deemed "political," "offensive," or "controversial," must be understood as viewpoint based.

Id. (citations omitted).

Heins argued that courts must recognize discrimination against the alleged "indecent" aspect of sexual speech as viewpoint-based discrimination. *See id.* at 169. She acknowledged, however, that this is a controversial proposition "because the notion that sex is not an appropriate subject matter for public discussion and display is so deeply ingrained in our society." *Id.*

97. *See id.* at 122.

98. *See id.*

99. *See* Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 788 (1985) (upholding exclusion of political speech from charity drive in federal workplace); Greer v. Spock, 424 U.S. 828, 828 (1976) (upholding military's ban on political speakers' entry onto base, although it allowed entry by non-political speakers); Lehman v. Shaker Heights, 418 U.S. 298, 304 (1974) (upholding municipal transit system's ban against political advertisements on car cards, which allowed array of other advertisements).

100. *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 384 (1993).

In *Lamb's Chapel v. Center Moriches Union Free School District*,[101] a school district prohibited a religious group from showing a religious film about child rearing and family values while allowing secular groups to show films on the same topic.[102] The Court held that denying access to a speaker solely to suppress their point of view skews debate and constitutes viewpoint discrimination.[103]

B. Viewpoint Discrimination in the Non-Public Military Forum

The Court unanimously agrees that the regulation of speech in a non-public forum must be viewpoint neutral.[104] This Part analyzes the interaction between this flat prohibition on viewpoint discrimination and the general policy of judicial deference to military decision-making.

1. *The Doctrine of Judicial Deference to the Military*

Several reasons justify the traditional policy of deference to the military, each of which is based on the unique importance of the military's mission.[105] First, the Supreme Court has repeatedly

101. *See id.*

102. *See id.* at 394.

103. *See id.* at 385.

104. *See Cornelius*, 473 U.S. at 806. For a discussion concerning the absolute prohibition against viewpoint discrimination see *The Content Distinction in Free Speech Analysis After Renton*, 102 HARV. L. REV. 1904 (1989).

105. For a discussion of these reasons, see *infra* notes 106-11 and accompanying text. As to the military's mission, the Supreme Court has stated "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." Parker v. Levy, 417 U.S. 733, 743 (1974) (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)); *see also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("to accomplish its mission the military must foster instinctive obedience, unity, commitment and esprit de corps."). The interest in maintaining good order and discipline has few counterparts in the civilian community. *See id.* One commentator explained:

> The primary mission of the armed forces is to defend our national interests by preparing for, and, when necessary, waging war, using coercive and lethal force. Responsibility for the awesome machinery of war requires a degree of training, discipline, and unit cohesion that has no parallel in civilian society.
>
> The armed forces must develop traits of character, patterns of behavior, and standards of performance during peacetime in order to ensure the effective application and control of force in combat. Members of the armed forces are subject to disciplinary rules and military orders, twenty-four hours a day, regardless of whether they are actually performing a military duty.
>
> Military service is a unique calling. It is more than a job. Our nation asks the men and women of the armed forces to make extraordinary sacrifices to provide for the common defense. While civilians remain secure in their homes, with the broad freedom to live where and with whom they choose, members of the armed forces may be assigned, involuntarily, to

stated that the constitutional doctrine of separation of powers mandates some form of deference.[106] The Constitution expressly gives Congress and the Executive power over military affairs.[107] Although the Supreme Court has not completely renounced its power of review over military affairs, the Court believes that the plenary power given to the other branches should not be second guessed by the judiciary.[108] Second, the Supreme Court cites the military's status as a separate community.[109] Recognizing the military's unique responsibility for national security, the Court has been reluctant to interfere with the military's role in training and supervising its personnel.[110] The third reason for deference is based on the limits of judicial competence concerning regulation of the military establishment's highly specialized needs.[111]

A long line of Supreme Court cases have given virtually unlimited deference to military decision-making when constitutional rights conflict with claimed military necessity.[112] Several major

---

> any place in the world, often on short notice, often to places of grave danger, often in the most spartan and primitive conditions.

Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994).

106. *See* U.S. CONST. art. I, § 8. This section makes Congress responsible for raising, maintaining and governing the military; *see also* U.S. CONST. art. II, § 2, cl. 1 (making President Commander-in-Chief of military).

107. *See id.*

108. *See* Chappell v. Wallace, 462 U.S. 296, 301 (1983).

109. *See Parker*, where the Court noted: "[t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history." 417 U.S. at 743 (quoting *Quarles*, 350 U.S. at 17); *see also* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian.").

110. *See Orloff*, 345 U.S. at 94. In *Orloff*, the Supreme Court acknowledged that the "judiciary [should] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." *Id.* at 93. As a result, the military has developed its own "military law" enforced by courts-martial. *See Parker*, 417 U.S. at 743 (citing Martin v. Mott, 12 Wheat. 19, 35 (1827)). Moreover, courts will "not overturn a [court-martial conviction] unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant's conduct." Avrech v. Secretary of the Navy, 520 F.2d 100, 103 (D.C. Cir. 1975).

111. *See* Rostker v. Goldberg, 453 U.S. 57, 66-67 (1981) (acknowledging Court's lack of experience concerning military affairs). *But see* C. Thomas Dienes, *When The First Amendment Is Not Preferred: The Military and Other "Special Contexts"*, 56 U. CIN. L. REV. 779, 821 n.163 (1988) (noting oddity of Court's assertion that its competence is limited by military complexities given complex, technical and non-legal issues regularly considered).

112. *See* United States v. Albertini, 472 U.S. 675, 675 (1985) (upholding nuclear protester's debarment from Air Force base open house); Schlesinger v. Ballard, 419 U.S. 498, 498 (1975) (upholding gender-based statutory distinctions on

cases have focused on First Amendment issues and the Supreme Court has consistently deferred to military decision-making concerning these matters.[113]

A chronological review of these cases starts with *Feres v. United States,*[114] where the Supreme Court held that soldiers could not maintain tort suits under the Federal Tort Claims Act (FTCA) against the military for injuries arising out of their military service.[115] As subsequent Supreme Court decisions have noted, this decision is based upon the "peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline."[116] The Court reasoned that the inherently dangerous character of the military mission presents grave risks that would make FTCA liability unreasonable.[117] Moreover, allowing such claims would deter military commanders from engaging in hazardous activities despite their importance to military operations.[118] Accordingly, the Court held that claims which challenge the absolute discretionary nature of personnel or administrative decisions by individual officers are non-justiciable.[119]

Three years later, the Court considered a claim challenging the constitutionality of a regulation governing the military's con-

---

tenure for regular officers); Gilligan v. Morgan, 413 U.S. 665, 665 (1973) (declining to become involved in administration of Ohio National Guard in wake of Kent State shootings); Burns v. Wilson, 346 U.S. 137, 137 (1953) (declining to re-evaluate evidence in habeas corpus case on constitutional issues already ruled upon by general courts-martial).

113. *See* Navy v. Huff, 444 U.S. 453 (1980); Brown v. Glines, 444 U.S. 348 (1980); Greer v. Spock, 424 U.S. 828 (1976).

114. 340 U.S. 135 (1950).

115. *See id.* at 146. Even earlier than *Feres* was Korematsu v. United States, 323 U.S. 214 (1944), where the Supreme Court deferred to military regulations placing Japanese-Americans in internment camps during World War II. *See generally* Eugene Rostow, *The Japanese American Cases—A Disaster,* 54 YALE L. J. 489 (1945). This decision, however, has been heavily criticized and courts rarely cite *Korematsu* as precedent. *See id.*

116. United States v. Brown, 348 U.S. 110, 112 (1954); *see also* United States v. Muniz, 374 U.S. 150, 162 (1963) (agreeing that *Feres* result was based on relationship of superior to subordinate).

117. *See Feres,* 340 U.S. at 148.

118. *See id.*

119. *See id.* A crucial distinction must be understood: constitutional violations by superior officers are not actionable in civilian courts because such lawsuits would discourage or deter military officers' decisions for fear of the personal legal ramifications. *See id.* In contrast, the same concerns about command and authority are not implicated by challenges that contest the constitutionality of military regulations. *See, e.g.,* Jorden v. National Guard Bureau, 799 F.2d 99, 110 (1986) (noting that when court instructs officer to stop applying regulation in arbitrary manner, it poses less threat to vigorous decision-making than would imposing personal liability on officer).

scription policies.[120] In *Orloff v. Willoughby*,[121] a psychiatrist, Stanley Orloff, was lawfully inducted into the Army Medical Corps under the Doctor's Draft Act, but he was denied a commission because he declined to admit whether he had been a member of the Communist Party.[122] As a result, Orloff was refused physician privileges and was employed as a medical technician instead.[123] Orloff claimed that he suffered discrimination because the limited rank and duties of a medical technician were not commensurate with those of a commissioned psychiatrist. He requested physician privileges or, alternatively, discharge from active duty.[124] The Supreme Court denied Orloff's requests in language that has been quoted repeatedly in subsequent military cases to validate the application of a special standard of deference.[125] Emphasizing that the military is a unique entity with its own set of rules, the Court ruled that the military is not subject to the same judicial criteria as civilian society.[126] The *Orloff* Court stated that the judiciary must not interfere in legitimate military concerns, just as the armed forces must not interfere with judicial matters.[127] Accordingly, the Court refused to review Orloff's discrimination claims and ruled that the military has a special right to control the actions of its members.[128]

120. *See infra* notes 121-28 and accompanying text.

121. 345 U.S. 83 (1953).

122. *See id.* at 89-90 (1955).

123. *See id.* at 88-89. Orloff was assigned to medical duties in the treatment of patients within the psychiatric field. *See id.* at 93. He was not allowed to perform functions that pertain to commissioned officers. *See id.* Specifically, Orloff was restricted from administering certain psychoactive drugs and forbidden to practice hypnotism on patients he did treat. *See id.* Orloff asked the Supreme Court to lift the restrictions on his psychiatric practice on the argument that he would be free to administer such treatments if he was in private practice. *See id.* The government asserted that, for reasons of security, Orloff should remain prohibited from administering drugs and hypnotism since his patients may be officers who possess important military information which Orloff might draw out while they were under the influence of his treatment. *See id.* at 89-90.

124. *See id.* at 86.

125. *See id.* at 94. *Compare Orloff*, 345 U.S. at 94 ("[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.") *with* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("[C]ourts must give great deference to the professional judgement of military authorities concerning the relative importance of a particular military interest.") *and* Chappel v. Wallace, 462 U.S. 296, 300 (1983) ("no military organization can function without the strict discipline and regulation that would be unacceptable in a civilian setting.").

126. *See Orloff*, 345 U.S. at 94.

127. *See id.*

128. *See id.* The Court refused to evaluate the discriminatory nature of Orloff's orders. *See id.* Concluding that discrimination is inherently unavoidable in

The Supreme Court's next decision, *Frontiero v. Richardson,*[129] helped define the parameters of military deference. In contrast to *Orloff, Fronterio* shows that judicial deference is not absolute. *Frontiero* involved a challenged administrative policy which required women in the military to produce evidence that their husbands were dependent on them before the military would grant spousal benefits, although the military allowed males to automatically claim their wives as dependants deserving spousal benefits.[130] The Court never mentioned the policy of deference in its opinion, suggesting that it "did not feel the congressionally legislated administrative procedure for receiving benefits constituted a 'core military function' worthy of deference."[131] Thus, *Frontiero* indicates that the policy of deference is not absolute. Courts will not apply such deference without first finding a satisfactory nexus between the challenged action and military necessity.[132]

In *Parker v. Levy,*[133] the next case to address military deference, a conscripted physician refused to train special service forces personnel and publicly urged black enlisted personnel to refuse to serve in Vietnam.[134] Levy was convicted under the general articles set forth in the Uniform Code of Military Justice (U.C.M.J.)[135] of

---

the Army, the Court illustrated its conclusion with the example that "some soldiers are assigned dangerous missions while others find soft spots." *Id.*

129. 411 U.S. 677 (1973).

130. *See id.*

131. John Nelson Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations,* 10 J.L. & POL'Y 147, 162 (1993).

132. *See id.*

133. 417 U.S. 733 (1974).

134. *See id.* at 738. Dr. Levy's statements, according to the Article 134 specification, suggested:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all hazardous duty and they are suffering the majority of the casualties.

Id. at 738 n.5.

135. *See id.* at 737-38. Article 133 of the Uniform Code of Military Justice, 10 U.S.C. § 933, provides: "any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." *Id.* Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934, provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or sum-

"conduct unbecoming an officer" and conduct prejudicial "to good order and discipline."[136] Levy challenged the general articles as unconstitutionally vague and overly broad.[137] Based on the military context, Justice Rehnquist determined that the appropriate standard for reviewing vagueness claims against the articles of the U.C.M.J. was the reasonale knowledge standard.[138] In reviewing Levy's overbreadth challenge, the Court required "substantial overbreadth."[139] While the Court concluded that the different character of military society requires a different application of the First Amendment and related doctrines, the Court failed to articulate a clear standard of review.[140]

In the following year, however, the Court further defined its evolving principle of deference.[141] In *Schlesinger v. Bal-*

---

mary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id.

136. *Id.* at 738.

137. *See Parker,* 417 U.S. at 755-57.

138. *See id.* at 756. Thus, if the defendant could have reasonably known that his action was criminal under the U.C.M.J., he is responsible for the criminal consequences of his actions. *See id.* at 757.

139. *Id.* at 755-57. The Court acknowledged that the Uniform Code of Military Justice regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates the conduct of civilians. *See id.* at 750. Nonetheless, the Court held that Articles 133 and 134 were not overly vague or broad. *See id.* at 756-78. The Court concluded that Levy had fair notice from the language in each article that his conduct was punishable. *See id.* at 755. The Court cited Broadrick v. Oklahoma for its proposition that where conduct and not merely speech is involved, the "overbreadth must 'not only be real, but substantial as well.'" *Id.* at 760 (citing Broadrick v. Oklahoma, 413 U.S. 602, 615 (1973)).

140. While the *Parker* Court engaged in military deference, it illustrated that it would first consider Levy's challenge on the merits and require the showing of some relationship between the challenged rule and the core military function asserted. *See* Ohlweiler, *supra* note 131, at 161. Despite the Court's attempt to explain a coherent principle of deference, however, "its professed standard of review of constitutional claims was not much clearer than it was in *Orloff.*" *Id.*

141. In 1975, the Supreme Court decided Schlesinger v. Ballard, 419 U.S. 498 (1975). For a discussion of *Ballard,* see *infra* notes 142-46 and accompanying text. In the same year, the Court also decided, Schlesinger v. Councilman, 420 U.S. 738 (1975). *Councilman* involved a prejudgment collateral attack on court-martial proceedings. *See Councilman,* 420 U.S. at 742. Army Captain Councilman was charged with off-base possession and distribution of marijuana. *See id.* at 743. Following arraignment, the local United States District Court enjoined the proceedings on the basis that these off-base activities were not "service-related" and, thus, not within the jurisdiction of the court martial. *See id.* at 747. The Supreme Court vacated the injunction and, echoing Parker v. Levy, held that the military can require a respect for duty and discipline without counterpart in civilian life. *See id.* at 756. Accordingly, the Court concluded that the Uniform Code of Military Justice represented a legitimate attempt by Congress to balance military necessities against fairness to service members. *See id.* at 757-58. *Compare Councilman,* 420 U.S. at 757-58 (imposing court-martial conviction after finding incident was "service-

lad,[142] the Court examined an equal protection challenge to 10 U.S.C. § 6382(a), which required male officers to be discharged after nine years of service if they were passed over twice for promotion and 10 U.S.C. § 6401(a), which gives women thirteen years of service before mandatory discharge for twice failing to be promoted.[143] The Court distinguished the case from *Fronterio*, finding a more direct relationship between the regulations and the asserted military interest of establishing military leadership.[144] After finding this nexus between the asserted military interests and the enacted regulation, the Court applied its still-undefined deference principle.[145] The Court used a rational relation test to uphold the regulation in question.[146]

In the next three related cases, the Supreme Court examined the impact of military deference on the First Amendment. In *Greer v. Spock*,[147] the Court examined a civilian's ability to exercise First Amendment rights in a military context.[148] The later companion cases, *Brown v. Glines*[149] and *Navy v. Huff*,[150] dealt with the exercise of free speech in the military by service members.[151] In *Spock*, civilians intending to stage a political rally were denied admission to a military base.[152] Local base regulations banned political speeches and demonstrations and the distribution of literature without prior approval of local commanders.[153] Under these regulations, a com-

related") *with* O'Callahan v. Parker, 395 U.S. 258, 258 (1969) (vacating court-martial conviction for off-base assault and attempted rape due to lack of service connection) *and* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960) (limiting exercise of court-martial jurisdiction over civilians connected with armed forces who commit offenses overseas).

142. 419 U.S. 498 (1975).

143. *See id.* at 501.

144. *See id.* at 510. The Court distinguished *Ballard* from *Fronterio*:

> In . . . *Frontiero* the reason asserted to justify the challenged gender-based classification was administrative convenience, and that alone. Here, on the contrary, the operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command.

Id. For a discussion of the facts in *Fronterio*, see *supra* notes 129-32 and accompanying text.

145. *See* Ohlweiler, *supra* note 131, at 162.

146. *See id.*

147. 424 U.S. 828 (1976).

148. *See id.* at 831-34.

149. 444 U.S. 348 (1980).

150. 444 U.S. 453 (1980).

151. *See Brown*, 444 U.S. at 349-53.

152. *See Spock*, 424 U.S. at 832.

153. *See id.* at 831. (quoting Fort Dix Reg. 210-27 (1970); Fort Dix Reg. 210-26 (1968)). Fort Dix Regulation 210-26 prohibits political speeches and similar activi-

mander had authority to bar literature or speeches tending to constitute a "clear danger to the loyalty, discipline, or morale of troops on the base."[154] The Court held that the regulations did not violate the First Amendment.[155] Although the Court stated that a commander's prohibition might be struck down if the regulations were "applied irrationally, invidiously, or arbitrarily," the majority did not specify what would constitute an unconstitutional application of the regulations.[156] The activists argued that the military base was open to the public in certain areas and there was no basis for selectively closing it to political candidates and distributors of unapproved literature.[157] The Supreme Court determined that the right of public access had not converted the base into a public forum for First Amendment purposes because it is the "business of a military installation like Fort Dix to train soldiers and not to provide a public forum."[158] The Court deferred to military interests and regula-

ties on the military reservation. *See id.* Fort Dix Regulation 210-27 prohibits the distribution of literature without prior approval of headquarters. *See id.* Regulation 210-27 provides that "[t]he distribution or posting of any publication, including newspapers, magazines, handbills, flyers, circulars, pamphlets or other writings, issued, published or otherwise prepared by any person, persons, agency or agencies . . . is prohibited on the Fort Dix Military Reservation without prior approval of . . . headquarters." *Id.* This regulation was issued in conformity with Army Regulation 210-10, P5-5(c) (1970), which states that permission to distribute a publication may be withheld only where "it appears that the dissemination of [the] publication presents a clear danger to the loyalty, discipline, or moral of troops at [the] installation . . . ." *Spock,* 424 U.S. at 831.

Because this procedure subjects literature to a content-based review, the effect of the regulation would be to bar radical campaign literature, while permitting the distribution of conventional political literature. Such a result raises the specter of viewpoint regulation.

154. *Id.*

155. *See id.*

156. *See id.*

157. *See id.* at 830. Fort Dix regulations mandated: "[C]ivilian vehicular traffic is permitted on paved roads within the reservation and civilian pedestrian traffic is permitted on both roads and foot paths. . . . The main entrances to Fort Dix are not normally guarded. . . . Civilians are freely permitted to visit unrestricted areas of the base." *Id.* In the past, civilian speakers were invited to speak at Fort Dix. *See id.* The subjects of their talks ranged from drug abuse to business management. *See id.* Clergymen were also invited to perform religious services in the chapel on base. *See id.*

158. *Id.* at 837-38. The Court asserted that "a necessary concomitant of the basic function of a military installation has been 'the historically unquestioned power . . . to exclude civilians . . . .'" *Id.* at 838. The Court rejected the notion that federal military reservations have traditionally served as a place for free public assembly and communication. *See id.* The Court explained in a footnote:

> The fact that other civilian speakers and entertainers had sometimes been invited to appear at Fort Dix did not of itself serve to covert Fort Dix into a public forum or to confer upon political candidates a First or Fifth Amendment right to conduct their campaigns there. The decision of the military authorities that a civilian lecture on drug abuse, a religious ser-

tions that were usually deemed unconstitutional, such as inhibiting free speech, were permissible in the military context.[159]

The Supreme Court elaborated this point in the companion cases of *Brown v. Glines*[160] and *Navy v. Huff*[161] which arose, respectively, from situations in the Air Force and Marine Corps. Both branches of the service required members to obtain advance approval from base commanders before circulating petitions on base.[162] In both cases, the Court rejected the claim that the regulations were an unconstitutional prior restraint on speech. The *Brown* Court relied on *Spock* where it found constitutional a similar regulation that allowed a commander to determine whether particular materials posed a clear danger to his troops.[163] The Court confirmed that it had "long ago recognized that the military must

---

vice by a visiting preacher at the base chapel, or a rock musical concert would be supportive of the military mission at Fort Dix surely did not leave the authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak on any subject whatever.

Id.

159. *See Spock*, 424 U.S. at 836. Accordingly, the Court concluded that there was no constitutional right to make speeches or to distribute literature at Fort Dix. *See id.*

160. 444 U.S. 348 (1980).

161. 444 U.S. 453 (1980).

162. *See id.* at 455-56; *Brown*, 444 U.S. at 349-50. In *Brown*, the Court examined the validity of an Air Force regulation requiring personnel to obtain prior approval before soliciting signatures on grievance petitions. *See id.* at 348. Air Force Regulations permit personnel to petition Members of Congress and other public officials. *See id.* at 349. All solicitations, however, must first be authorized by the commander. *Id.* at 350 n.1 (citing Air Force Reg. 30-1(9) (1971)). The Regulations require approval for the distribution of "any printed or written material other than publications of an official governmental agency." *See id.* at 350 n.2 (citing Air Force Reg. 35-15(3)(a) (1970)). The Regulations specify: "[w]hen prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of the members of the Armed Forces, or a material interference with the accomplishment of a military mission would result." *Id.* at 350 n.2 (citing Air Force Reg. 35-15(3)(a)(2) (1970)).

163. *See id.* at 353 (citing Greer v. Spock, 424 U.S. 828, 840 (1976)). The Supreme Court cited *Spock* for the proposition that "nothing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or moral of troops on the base under his command." *Id.* (quoting *Spock*, 424 at 840). The *Brown* Court suggested that it was unpersuaded by an attempt to distinguish *Spock* on the ground that the plaintiffs in that case were civilians who had no specific right to enter a military base. *See id.* at 358 n.13. In *Spock*, the Court rejected a facial challenge to a regulation that required "any person," civilian or military, to obtain prior permission for the distribution of literature on a base. *See Spock*, 424 U.S. at 831. The *Brown* Court reasoned that "[u]nauthorized distributions of literature by military personnel are just as likely to undermine discipline and morale as similar distributions by civilians." *Brown*, 444 U.S. at 358 n.13. Furthermore, the Court noted that the military has greater authority over military personnel than civilians. *See id.*

possess substantial discretion over its internal discipline."[164] In upholding the regulations, the Court remained unclear regarding the standard of deference.[165] It appears that the Court reviewed the merits, balanced each party's competing interests and concluded that the regulations "protect[ed] a substantial governmental interest" unrelated to the suppression of free expression and did not restrict speech any more than was reasonably necessary to protect the military's interests.[166]

One year later, in *Rostker v. Goldberg*,[167] the Supreme Court returned to its policy of complete deference to the military and refused to engage in substantive interest balancing.[168] In *Rostker*, the Supreme Court evaluated an equal protection claim challenging the constitutionality of the Military Selective Service Act, which required only males to register for the draft.[169] The Court dismissed the claim and noted that judicial deference is at its apogee when reviewing Congress' chosen means for regulating the military.[170]

In *Goldman v. Weinberger*,[171] a more recent case involving deference, the Court continued its retreat toward complete deference with no substantive interest balancing.[172] In *Goldman*, the Supreme Court rejected a challenge to an Air Force regulation arising under the "free exercise" clause of the First Amendment.[173] At issue was whether an active-duty Air Force Captain had a right under the First Amendment to wear a yarmulke, a skullcap prescribed by the Or-

164. *Id.* at 357. The Court cited *Orloff*, *Levy*, and *Coucilman* for this proposition. *See id.*

165. *See* Ohlweiler, *supra* note 131, at 163.

166. *See Huff*, 444 U.S. at 458; *Brown*, 444 U.S. at 355. One observer noted that the *Brown* Court confirmed an emerging body of case law that "sets the military apart" with regard to constitutional protection of First Amendment rights. *See* Levin, *supra* note 3, at 22 (arguing that if speech in military were subjected to civilian standards, there would be adverse impact on combat readiness).

167. 453 U.S. 57 (1981).

168. *See id.* at 70. "[J]udicial deference . . . is at its apogee when legislative action under Congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Id.*

169. *See id.* at 76-78.

170. *See id.* at 70. Accordingly, the Court dismissed the claim, holding that the decision to limit registration to men resulted from a considered determination by Congress that restrictions on the use of women in combat made it pointless to require their registration. *See id.* at 76-78.

171. 475 U.S. 503 (1986).

172. *See id.* at 509.

173. *See id.* The First Amendment provides, in part, that: "Congress shall make no law effecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. Goldman asserted that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to its uniform dress requirements for religious apparel. *See Goldman*, 475 U.S. at 509.

thodox Jewish faith, despite an Air Force regulation prohibiting headgear while indoors.[174] In upholding the regulation, Justice Rehnquist's majority opinion quoted deferential language from previous cases and applied a standard of extreme deference to military judgment.[175] The Court did not require an express nexus between the challenged regulation and the military's interest.[176] Instead, the Court accepted carte blanche the military's assertion that the dress regulation promoted uniformity necessary for military efficiency.[177] Significantly, although the *Goldman* majority supported the outcome, a plurality of that majority did not rely exclusively on Rehnquist's extremely deferential language.[178] Instead, they required some articulated relationship between the regulation and the military's asserted interest in efficiency.[179]

---

174. *See id.* at 505 (citing Air Force Reg. 35-10, para. 1-6.h(2)(f) (1980)). "Headgear will not be worn. . . [w]hile indoors except by armed security police in the performance of their duties." *Id.*

175. *See id.* at 509. The Court stated, "[t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgement." *Id.* The *Goldman* Court cited language from previous cases to support the proposition that the judiciary should not interfere with military matters. *See id.* The Court stated, "[t]he military must insist upon a respect for duty and a discipline without counterpart in civilian life." Schlesinger v. Councilman, 420 U.S. 738, 757 (1975). "[W]e have repeatedly held that the military is, by necessity, a specialized society separate from the civilian society." Parker v. Levy, 417 U.S. 733, 743 (1974). "The essence of military service is the subordination of the desires and interests of the individual to the needs of the service." Orloff v. Willoughby, 345 U.S. 83, 92 (1955).

176. *See Goldman*, 475 U.S. at 516 (Brennen, J., dissenting). "When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a credible explanation of how the contested practice is likely to interfere with the proffered military interest." *Id.*

177. *See id.* at 509. The Court deferred to the considered professional military judgment of the Air Force in the "traditional outfitting of personnel in standardized uniforms," as set forth in its regulations, which encourages subordination of personal interests to those of the group and encourages "hierarchical unity" by eliminating individual distinctions other than differences in rank. *See id.*

178. *See id.* at 513. (Justices Stevens, White and Powell concurred with Justice Rehnquist's majority opinion).

179. *See id.* at 510-13 (Stevens, J., concurring). Although Stevens never articulated a clear standard of review, he suggested that a "reasonableness" relationship between the regulation and the military's interests in sustaining discipline, uniformity and obedience is necessary. *See id.*; *see also* Seth Harris, Note, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men From the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171, 216-17 (1989) (suggesting that Stevens' dissent in *Goldman*, which articulated reasonable relationship, "could perhaps be analogized to the 'substantial' relationship standard inferred from *Parker*, *Chappell* and *Rostker*.").

Justice O'Connor was openly critical of the Court's failure to require proof of a reasonable relationship between the regulation and the military's interests. *See Goldman*, 475 U.S. at 528-33. She charged the Court with failing to weigh Goldman's interest in Free Exercise against the military's interest in uniformity in

From these decisions, it appears that the Court has established a deferential review of challenges to military regulations. Although the Court considered some degree of substantive interest balancing, recent decisions suggest that this practice has diminished. The *Goldman* case highlights the Court's willingness to defer to military interests. Nonetheless, *Goldman's* strong concurring and dissenting opinions signal that the Court will likely still require a "reasonable relationship" between a challenged military regulation and the military's interests.[180]

2. *Balancing Military Deference with the Prohibition Against Viewpoint Discrimination in the Non-Public Forum*

The doctrinal rule that appears to have the Justices' universal approval is that the regulation of speech in a non-public forum must be "viewpoint neutral."[181] On the other hand, the policy of deference to military decision-making has often sanctioned otherwise unconstitutional regulations.[182] This leaves the question open as to which doctrine prevails in the event of a conflict. The answer revolves around understanding that (1) the prohibition against viewpoint discrimination in the non-public forum is not absolute; (2) sometimes courts recognize viewpoint discrimination as a regular and unavoidable aspect of the internal management of speech in the non-public forum; and (3) military deference may not always justify allowing viewpoint discrimination.

a. When Viewpoint Discrimination is Permissible in the Non-Public Forum

Viewpoint discrimination is often an unavoidable aspect of the internal management of non-public forum speech.[183] Consequently, imposing an absolute ban on viewpoint discrimination

dress. *See id.* at 530. Furthermore, her opinion is the only one that clearly articulates a standard of review for a Free Exercise claim: first, when government attempts to deny a Free Exercise claim, it must show that an unusually important interest is at stake; second, the government must show that granting the requested exemption will do substantial harm to that interest. *See id.*

180. *See id.* at 510-33.

181. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985).

182. *See, e.g., Goldman*, 475 U.S. 503 (preventing military personnel from freely exercising religion); Brown v. Glines, 444 U.S. 348 (1980) (upholding prior restraint on speech for military personnel); Parker v. Levy, 417 U.S. 733 (1974) (rejecting vagueness and overbreadth claims in military context and punishing otherwise protected political speech).

183. *See* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 U.C.L.A. L. REV. 1713, 1825 (1987).

would bring government organizations to a halt.[184] For example, when a bureaucratic official commands a subordinate to present Topic A at a staff meeting rather than Topic B, this is viewpoint discrimination.[185] Similarly, when a military officer commands his staff to draft a defense plan relying on strategic rather than conventional weaponry, he engages in viewpoint discrimination.[186] Nonetheless, such actions are permitted.

This result conflicts with the public forum analysis set forth in *Perry Education Association v. Perry Local Educators Association,* which flatly prohibits viewpoint discrimination in the non-public forum.[187] A contradiction arises because the *Perry* analysis is not meant to apply to the regulation of "internal speech" within an organization.[188] Rather, the *Perry* analysis applies when an organization in a non-public forum discriminates on viewpoint among outsiders who are invited to use the forum.[189] Consequently, the *Perry* analysis has been difficult to reconcile with non-public forum cases which involve a mixture of internal speech and public speech within a non-public forum.[190] Courts often ignore *Perry* and permit viewpoint discrimination.[191]

This point is illustrated in *Jones v. North Carolina Prisoner's Labor Union,*[192] in which a non-public forum prison extended access to outside organizations (for example, the Jaycees, Alcoholics Anonymous, and the Boy Scouts).[193] Prison wardens stated that such organizations served "a rehabilitative purpose, working in harmony with the goals and desires of the prison administrators . . . ."[194] The Supreme Court approved the prison policy and ignored viewpoint discrimination issues.[195] Apparently, the Court was persuaded that these outside speakers provided speech similar to the internal speech necessary for the proper function of the prison.[196] The

184. *See id.*

185. *See id.*

186. *See id.*

187. *See* Perry Educ. Ass'n. v. Perry Local Educ. Ass'n., 460 U.S. 37, 45 (1983) (developing forum analysis).

188. *See id.*

189. *See id.*

190. *See, e.g.*, Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977).

191. *See id.* at 135.

192. 433 U.S. 119 (1977).

193. *See id.* at 133.

194. *Id.* at 134.

195. *See id.* at 135.

196. One commentator has suggested that "if the Court were serious about imposing a ban on viewpoint discrimination . . . the services and expertise of Al-

Court, however, never suggested that prison wardens can engage in arbitrary viewpoint discrimination. For example, one commentator has argued that the wardens could not permit Baptists to address inmates, but exclude Methodists.[197] Therefore, viewpoint discrimination is prohibited when an institution permits selective access to members of the public for reasons other than achieving legitimate institutional ends.

This analysis is complicated, however, by the difficult determination of when "outside speech" becomes internal speech.[198] The Supreme Court has not established clear parameters or rules to distinguish outside and internal speech.[199] One scholar accepted the challenge and attempted to define the differing forms of speech.[200] He uses a hypothetical supposing:

> . . . prison officials permit a citizens' group supporting an initiative to issue bonds for the construction of new prison facilities access to prison facilities for news conferences and so forth, but deny such access to citizens' groups opposing the initiative. It is clear in the example that officials are engaging in viewpoint discrimination to serve the institutional purpose of building better prison facilities, and that this is a legitimate institutional objective. Yet we would nevertheless condemn the discrimination. The reason, I think, is that the citizen's groups have not been incorporated into the organizational domain of the prison and endowed with specifically organizational roles, so that the regulation of their speech is not analogous to the internal management of speech. Unlike Alcoholics Anony-

---

coholics Anonymous could be obtained only at the price of granting equal access to groups promoting drunkenness or drug abuse." *See* Post, *supra* note 183, at 1826. Obviously, such a result would completely frustrate the prison's policies.

197. *See id.* at 1827.

198. *See id.* "The pertinent inquiry then concerns the question of when members of the general public have assumed quasi-organizational status so that the regulation of their speech is 'like' the internal management of speech." *Id.* at 1828.

199. *See id.* The Court has often accorded members of the general public quasi-organizational status so that their speech can be regulated on viewpoint like internal speech. *See id.* For example, in *Greer v. Spock*, the challenged regulations state that permission to distribute a publication may be withheld only where "it appears that the dissemination of the publication presents a clear danger to the loyalty, discipline, or moral of troops . . . ." 424 U.S. 828, 831 (1976). This regulation effectively censored speech on the basis of content and viewpoint. *See id.* at 869 n.16. The Court chose to ignore this consequence, however, by considering the boosting of morale to be an internal management function that could be regulated on the basis of viewpoint. *See id.* at 869-70.

200. *See* Post, *supra* note 183, at 1828.

> mous in *Jones*, the citizens' groups are not performing internal management functions that prison officials themselves could perform . . . .[201]

The prohibition against viewpoint discrimination depends on the relationship between members of the public and the internal functioning of the institution.[202] When members of the public are performing specifically organizational roles, viewpoint discrimination is permitted.[203] In contrast, if members of the public are invited to speak for purposes that are not intrinsic to institutional functioning, then viewpoint discrimination is prohibited.[204] Underlying this distinction is the notion that viewpoint discrimination is permissible when it is sufficiently similar to the internal management of speech.[205]

b. Military Deference May Not Always Justify Viewpoint Discrimination

An important and unresolved question is whether the policy of military deference negates the prohibition against viewpoint discrimination. Commentators suggest that this question involves two inquiries: (1) whether courts should defer to military officials to determine if members of the general public have attained quasi-organizational status, and (2) whether courts should defer to military officials who assert that viewpoint discrimination is needed to attain institutional ends.[206]

The first inquiry considers whether courts should defer to military officials in determining whether the public has attained quasi-organizational status.[207] Commentators suggest that courts, rather than the military, should determine this first inquiry since the determination of the quasi-organizational status of members of the general public is fundamentally a legal characterization.[208]

The second inquiry addresses whether the prohibition against viewpoint discrimination should override the policy of military def-

201. *Id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *See* Post, *supra* note 183, at 1828.
206. *See id.* at 1829. Post's analysis refers to "warranted deference" in general. *See id.* That he does not specifically examine military deference is not fatal to this note's analysis however.
207. For a discussion of the courts deference to military officials regarding quasi-organizational status, see *infra* note 208 and accompanying text.
208. *See* Post, *supra* note 183, at 1829.

erence.[209] In the past, courts have sustained regulations of speech in the military, and indeed criminal convictions, based largely upon the viewpoint of speech.[210] In *Parker v. Levy*, the Court upheld a court-martial conviction of an Army officer who urged black soldiers to refuse to fight in Vietnam based on his belief that it was a racist war.[211] The *Parker* Court reasoned that Levy's views "urg[ed] Negro enlisted men not to go to Vietnam if ordered to do so" and that Levy's speech was punishable under the Uniform Code of Military Justice for conduct "to the prejudice of good order and discipline."[212] Other cases have also upheld military regulations that discriminated based on viewpoint. For example, in *Greer v. Spock*, the Court upheld a regulation that imposed a prior restraint on all political campaign literature by requiring a military commander to approve the literature before distribution.[213] The Fort Dix regulation stated that the only publications that a military commander may disapprove are those found to constitute "a clear danger to [military] loyalty, discipline, or morale."[214] The commanding officer of Fort Dix testified that civilian visitors could speak to soldiers if the content of their proposed speech furthered the "military mission."[215] The Court overlooked this viewpoint discrimination "evidently because it considered the boosting of military morale to be an internal management function."[216]

One final case, although not involving the military forum, best illustrates these points by analogy. In *Cornelius v. NAACP Legal Defense & Education Fund*,[217] the Court held that the Combined Federal Campaign (CFC), an annual charitable fund-raising drive conducted in the federal workplace, was a non-public forum, and that legal defense and political advocacy organizations could not be excluded from the CFC because of their controversial natures.[218]

---

209. For a discussion of whether the prohibition against viewpoint discrimination should override military deference, see *infra* notes 210-25 and accompanying text.

210. *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974).

211. *See generally* Parker v. Levy, 417 U.S. 733 (1974). For a discussion of *Parker*, see *supra* notes 133-40 and accompanying text.

212. *Parker*, 417 U.S. at 757.

213. *See generally* Greer v. Spock, 424 U.S. 828 (1976). For a discussion of *Spock*, see *supra* notes 147-59 and accompanying text.

214. *Spock*, 424 U.S. at 840.

215. *Id.* at 868 n.16 (Brennen, J., dissenting).

216. Post, *supra* note 183, at 1828.

217. 473 U.S. 788 (1985).

218. *See id.* at 811-12. The CFC is an annual charitable fund-raising drive conducted in the federal workplace. *See id.* at 790. Participating organizations must confine their fund-raising activities to a thirty-word statement which is included on

The government argued that exclusion was necessary because their participation jeopardized the success of the campaign and created controversy among federal employees during the campaign.[219] The Court understood that a certain degree of deference was warranted regarding managerial decisions concerning the use of the CFC.[220] Nevertheless, the Court held that the viewpoint discrimination was impermissible.[221] The Court reasoned that the CFC was not closely related to the attainment of any specific organizational objectives; rather, it was a means of affecting the surrounding environment in ways unrelated to any particular organizational mission.[222] Therefore, the Court believed that the CFC did not fulfill a role that was

---

the campaign literature and pledge cards. *See id.* at 791. Volunteer federal employees distribute the campaign literature to their co-workers along with pledge cards. *See id.* Contributions can take the form of a pay-roll deduction or a lump-sum payment. *See id.* The CFC collects over $100 million in charitable contributions each year. *See id.* at 791.

The excluded groups included the NAACP Legal Defense Fund and Educational Fund, Inc., the Sierra Club Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, the Federally Employed Women Legal Defense and Education Fund, the Indian Law Resources Defense Center, the Lawyers' Committee for Civil Rights under Law, and the Natural Resources Defense Council. *See id.* at 793. Each of these organizations attempts to influence public policy through one or more of the following means: political activity, advocacy, lobbying, or litigation on behalf of others. *See id.*

219. *See id.* at 807-09. The Government asserted that the purpose of the CFC is to provide an opportunity for traditional health and welfare charities to solicit contributions, while at the same time maximizing private support of these charities which in turn reduces the cost to the Federal Government. *See id.* at 806. The Government contended that the participation of legal defense and political advocacy organizations hindered the success of the CFC campaign because they were not viewed as worthwhile as traditional health and welfare charities. *See id.* at 807. Furthermore, the Government contended that because the CFC campaign is conducted during working hours, any controversy surrounding the participating organizations will produce unwelcome disruption of the work environment. *See id.*

The record adequately supported the Government's position that including legal defense and political groups would hinder the campaign and disrupt the workplace:

> [The Office of Personnel Management] submitted a number of letters from federal employees and managers, as well as from Chairmen of Local Federal Coordinating Committees and Members of Congress expressing concern about the inclusion of groups termed 'political' or 'nontraditional' in the CFC. More than 80 percent of this correspondence related requests that the CFC be restricted to 'non-political,' 'non-advocacy,' or 'traditional' charitable organizations.

Id.

220. *See id.* at 808-09 (stating that Government's decision to restrict access to non-public forum need only be reasonable). "Here, the President could reasonably conclude that a dollar directly spent on providing food or shelter to the needy is more beneficial than a dollar spent on litigation that might or might not result in aid to the needy." *Id.* at 789.

221. *See id.*

222. *See Cornelius*, 473 U.S. at 795. The Court stated that "[t]he CFC was designed to lessen the Government's burden in meeting human health and wel-

intrinsic to the organizational mission of any particular government organization.[223] Thus, the CFC functioned similarly to the citizens' groups advocating prison bonds, in that both were independent of any specific institutional function. Therefore, their activities could not be regulated based on viewpoint like the internal management of speech.[224] The Court, however, did not invoke the prohibition against viewpoint discrimination, but rather, remanded the case to decide if viewpoint discrimination in fact existed.[225]

IV. NARRATIVE ANALYSIS

A. The Majority Opinion

1. *Forum Analysis*

In *General Media Communications, Inc. v. Cohen*, the United States Court of Appeals for the Second Circuit reviewed the district court's decision for abuse of discretion.[226] The court commenced its analysis by stating that when evaluating regulations on speech in a particular forum, a court must first determine whether the forum is public or non-public.[227] In evaluating content-based regulations, the court stated that a "strict scrutiny" standard must be used to determine whether the First Amendment has been violated if the forum is public, and the less strict "reasonableness" standard must be used if the forum is non-public.[228] The court then relied on established precedent and concluded that military bases are non-public forums.[229]

---

fare needs by providing a convenient, nondisruptive channel for federal employees to contribute to nonpartisan agencies that directly serve those needs." *Id.*

223. *See id.*

224. *See id.*

225. *See id.*

226. *See General Media*, 131 F.3d at 278. Such an abuse "can be found if the district court relied upon a clearly erroneous finding of fact or incorrectly applied the law." *Id.*

227. *See id.*

228. *See id.; see also* Perry Educ. Ass'n. v. Perry Local Educ. Ass'n., 460 U.S. 37, 45 (1983). For a discussion of the differing standards of review involved in public forum analysis, see *supra* notes 69-71 and accompanying text.

229. *See General Media*, 131 F.3d at 280. "Almost without exception, courts have concluded that military bases fall into the non-public forum category." Shopco Distrib. Co. v. Commanding Gen., 885 F.2d 167, 172 (4th Cir. 1989); *see also* Greer v. Spock, 424 U.S. 828, 837-38 (1976); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955). Military property becomes public in character only when the government intentionally abandons "any right to exclude civilian traffic and any claim of special interest in regulating expression." United States v. Albertini, 472 U.S. 675, 685-86 (1985). Accordingly, governmental intent should be the touchstone of forum analysis. *See* Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991).

2. *Content & Viewpoint Discrimination Analysis*

Next, the court addressed whether the Act constituted content-based discrimination or viewpoint discrimination.[230] The court noted that the government may reasonably restrict expressive activity in a non-public forum on the basis of content, as long as the restriction is not "an effort to suppress the speaker's activity due to disagreement with the speaker's view."[231] The court suggested that if the Act discriminated on viewpoint, it would be subject to "much more exacting constitutional scrutiny."[232] The court acknowledged, however, that the distinction between restrictions on content and viewpoint is not precise.[233]

The court next examined the Act's provision that "prohibits the sale or rental of recordings and periodicals the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way."[234] The court rejected GMC's argument that this construction targets a viewpoint of "lasciviousness."[235] The court declined to find that"lasciviousness" was a "specific premise" or "standpoint from which a variety of subjects [could] be discussed and considered."[236] The court reasoned that it would be impossible to discuss and consider political issues from a lascivious viewpoint.[237] Instead, the court interpreted "lascivious" as specifying the subject matter (ie., content) that the Act encompasses.[238] Therefore, the court concluded that the Act banned not only depictions of nudity including sexual or excretory activities or organs, but also depictions that are lascivious.[239] Accordingly, the court concluded that the Act did not discriminate on viewpoint.[240]

---

230. *See General Media*, 131 F.3d at 280.

231. *Id.; see also* International Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

232. *General Media*, 131 F.3d at 281. In *Perry Educ. Ass'n.*, the Court held that even in a non-public forum, the government may not regulate speech in "an effort to suppress expression merely because public officials oppose the speaker's view." 460 U.S. at 46.

233. *See* Rosenberger v. Rector and Visitors of the Univ. Of Va., 515 U.S. 819, 831 (1995).

234. *General Media*, 131 F.3d at 281.

235. *Id.*

236. *Id.*

237. *See id.* at 282.

238. *See General Media*, 131 F.3d at 282.

239. *See id.*

240. *See id.*

3. *"Reasonableness" Analysis*

After concluding that the Act was based on content rather than viewpoint, the court determined that the Act reasonably restricted expressive activity in light of the purpose of the military forum.[241] The court cited *Cornelius v NAACP Legal Defense & Educucation Fund,*[242] for the proposition that a restriction in a non-public forum "need only be reasonable; it need not be the most reasonable or the only reasonable limitation."[243] The *General Media* court considered the government's legitimate interest in regulating the military context.[244] The government argued that military honor, professionalism, and decorum would be adversely affected by the military-sponsored sale of sexually explicit materials.[245] The *General Media* court accepted the government's argument that the Act is a reasonable attempt to protect the military's image and core values.[246] The court was unpersuaded by GMC's argument that the Act is defective because it failed to include a statement of the purpose of the statute within its text.[247] Rather, the court found that the very title of the Act, ("Military Honor and Decency Act"), enunciated its pur-

241. *See id.*

242. 473 U.S. 788 (1985).

243. *Id.* at 802.

244. *See General Media,* 131 F.3d at 283-85. Congress is explicitly empowered under Article I, Section 8, Clause 14, of the Constitution to "make Rules for the Government and Regulation of the land and naval Forces." *Id.* To ensure that the armed forces will be prepared for combat, Congress is empowered to enact detailed laws, regulations, and directives designed to ensure that discipline is maintained. *See id.* "Military law" is a generic term that refers to the delivery of legal services to the military. *See id.* This term is defined in the Preamble to the 1984 Manual for Courts-Martial as follows:

> Military law consists of the statutes governing the military establishment and the regulations issued thereunder, the constitutional powers of the President and the regulations issued thereunder, and the inherent authority of military commanders. Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to non-judicial punishment. The purpose of military law is to . . . promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

Id. (citing Manual for Courts' Martial, United States, 1984, at I-1 (1984)).

245. *See id.* at 284-85.

246. In *Parker v. Levy,* the Court recognized that the military is, by necessity, a specialized society separate from civilian society. *See* 417 U.S. 733, 742 (1974). The Court explained that the basis for this difference stems from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).

247. *See General Media,* 131 F.3d at 283.

pose.[248] Accordingly, the *General Media* court concluded that the Act did not violate the First Amendment.[249]

B. The Dissent

Judge Parker's dissent contended that courts must strike a balance between deference to the military and safeguarding constitutional freedoms.[250] Judge Parker agreed with the majority that the military forum was non-public, but he disagreed with the majority's characterization of the Act as content-based discrimination.[251] Instead, Judge Parker suggested that, by targeting "lascivious" displays of nudity, the Act discriminated on the basis of viewpoint.[252] He explained:

> Portrayals of nude men and women designed to elicit a sexual response illustrate an idea: that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination. Depictions of nude men and women in nonsubmissive ways, or in ways not designed to arouse, are permitted under the Act. This is . . . viewpoint discrimination.[253]

After concluding that the Act constituted viewpoint discrimination, Justice Parker stated that such laws "are traditionally subject to the highest level of review."[254] He acknowledged, however, that the doctrine of military deference lowers this standard.[255] Judge Parker suggested that even under the less strict "intermediate standard," the government failed to meet its burden.[256] The govern-

248. *See id.*

249. *See id.* at 285. The court also held the Act was not void for vagueness and dismissed GMC's Equal Protection Claim. *See id.* at 286-88.

250. *See id.* at 288 (Parker, J., dissenting).

251. *See id.* at 289-91.

252. *See General Media*, 131 F.3d at 290-91 (Parker, J., dissenting). The Act defined lascivious as "lewd and intended or designed to elicit a sexual response." *Id.* at 290 (Parker, J., dissenting).

253. *Id.* (Parker, J., dissenting).

254. *Id.* at 291-92 (Parker, J., dissenting).

255. *See id.* at 292 (Parker, J., dissenting). Judge Parker stated, "it is clear that, on a military base, some regulations that restrict speech because of the message conveyed are permissible." *Id.* (Parker, J., dissenting). Judge Parker also noted that judicial deference to the military decreases as the challenged speech or conduct becomes less harmful to the military mission. *See id.* (Parker, J., dissenting).

256. *See id.* at 292 (Parker, J., dissenting). Judge Parker "found" an intermediate standard of review used in Brown v. Glines. *See id.* at 292 (Parker, J., dissenting) (citing Brown v. Glines, 444 U.S. 348 (1980)). In *Brown*, the Supreme Court upheld a regulation authorizing a base commander to exclude literature that con-

ment failed because it only offered post-hoc rationalizations for the Act.[257] There was no evidence of congressional history or military considerations to prove that the actual sale of sexually explicit materials on base would tarnish the military's image of honor, professionalism and proper decorum.[258] Judge Parker cautioned that courts must not defer to every unsubstantiated military regulation.[259]

V. CRITICAL ANALYSIS

In *General Media Communications, Inc. v. Cohen*, the Second Circuit Court of Appeals mischaracterized the Military Honor and Decency Act as a reasonable content-based regulation.[260] Due to this mischaracterization, the court approved a statute that actually discriminated on the impermissible basis of viewpoint. In classifying the Act as a content-based restriction, the Second Circuit avoided the opportunity to determine which standard of review should apply to viewpoint-based restrictions occurring in the military context.[261] This mischaracterization springs from a line of Supreme Court cases which fails to articulate a clear standard as to how or when the military can restrict constitutional rights.[262] The law is further complicated by the Supreme Court's adherence to the conflicting degrees of deference given to the military.[263]

---

stituted "a clear danger to the loyalty, discipline, or morale of troops." *Brown*, 444 U.S. at 350. The Court upheld the regulations because they "restrict[ed] speech no more than [was] reasonably necessary to protect the substantial government interest." *Id.* at 355.

257. *See General Media*, 131 F.3d at 293 (Parker, J., dissenting).

258. *See id.* (Parker, J., dissenting). The government offered no factual proof to support its assertions that sale of lascivious materials would negatively affect the military. *See id.* (Parker, J., dissenting). Judge Parker stated that a conjectural "risk" is not enough. *See id. See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 72-74 (1981) (upholding military registration regulation challenged on Equal Protection grounds after deferring to extensive national attention and public debate, report of Senate Armed Services Committee, hearings held by both houses, and various committees).

259. *See General Media*, 131 F.3d at 193-94. (Parker J., dissenting).

260. *See id.* at 287-88.

261. *See id.* at 287.

262. For a discussion of these cases, see *supra* notes 112-79 and accompanying text.

263. The nature of the Court's deference has varied considerably. *Compare* Feres v. United States, 340 U.S. 135 (1950) (holding tort suits against military nonjusticiable), Orloff v. Willoughby, 345 U.S. 83 (1953) (refusing to review discrimination claims against military), *Rostker*, 453 U.S. at 57 (1981) (engaging in complete deference to military with no substantive interest balancing) *and* Goldman v. Weinberger, 475 U.S. 503 (1986) (applying standard of extreme military deference to Free Exercise claim) *with* Parker v. Levy, 417 U.S. 733 (1974) (considering relationship between challenged rule and core military function) *and* Schlesinger v.

In addition, the Supreme Court has not clearly defined the parameters of the prohibition against viewpoint regulation in nonpublic forums.[264] By categorizing the Act as a content-based restriction and by holding that the act is valid in light of the military's interests, the court avoided the uncertainty surrounding deference to military judgement and the differences between discrimination based on content and viewpoint. As a result, the Second Circuit may have sacrificed First Amendment protections by applying an overly deferential standard of review.

A. Viewpoint-Based Regulation

Categorizing the Act as a content-based restriction enabled the *General Media* court to conclude that the Act was reasonable in light of relevant military interests.[265] The majority rejected the argument that the Act targeted a viewpoint by banning materials that depict nudity "in a lascivious way."[266] To support its conclusion that "lascivious" is an adjective describing subject matter, rather than a method to suppress a particular viewpoint, the court relied on dicta in *R.A.V. v. City of St. Paul.*[267] In *R.A.V.*, the Supreme Court suggested that a state may prohibit obscenity that involves the most lascivious displays of sexual activity.[268] The *General Media* majority believed that the *R.A.V.* Court treated lascivious as an adjective.[269] Such a characterization, however, does not advance the inquiry. As Justice Parker explained in his dissent, "viewpoints and subject matters are both identified by some adjective, the question is whether

---

Ballard, 419 U.S. 498 (1975) (finding nexus between regulation and core military interest), Greer v. Spock, 424 U.S. 828 (1976) (reviewing merits and balancing interests) *and* Brown v. Glines, 444 U.S. 348 (1980) (same).

264. *See* Post, *supra* note 183, at 1832 ("At some point or another the Court will have to . . . clarify the circumstances under which viewpoint discrimination will override warranted deference.").

265. *See General Media,* 131 F.3d at 282.

266. *Id.*

267. 505 U.S. 377 (1992). In his dissent, Justice Parker argued that the majority's reliance on *R.A.V.* was misguided:

> Not only is nonobscene sexually explicit speech protected, unlike the obscene speech which is the subject of the Supreme Court's hypothetical, but to exclude only the most lascivious displays of sexual activity still allows in the "marketplace of ideas" the views expressed by lascivious displays of sexual activity, even if it prohibits the most extreme of those views.

Id. at 291 (Parker, J., dissenting).

268. *See R.A.V.,* 505 U.S. at 388. "A State might choose to prohibit only that obscenity which is the most patently offensive in its prurience." *Id.*

269. *See General Media,* 131 F.3d at 282.

the statute will skew one side of a debate."[270] Preventing the sale of magazines depicting lascivious displays of nudity censors a viewpoint that depicts the human body as an object of lust or desire.[271] Debate is skewed when magazines containing non-lascivious nudity are allowed to be sold in the military marketplace.[272] By upholding the regulation, the *General Media* court contradicted the Supreme Court's decision in *Lamb's Chapel*, where the Court ruled that denying access to a speaker solely to suppress a point of view on an otherwise protected subject, skews debate and constitutes viewpoint discrimination.[273] In sum, the *General Media* court should have classified the Military Honor and Decency Act as a viewpoint-based speech regulation.

B. Determining the Proper Standard of Review

Had the *General Media* court characterized the law as a viewpoint-based regulation, the court would have faced considerable uncertainty in determining whether the prohibition against viewpoint discrimination could be overcome by the policy of military deference.[274] Unfortunately, the Supreme Court has not yet clarified the law in this area.[275] Prior cases involving constitutional challenges against the military provide some guidance.[276] The Court has established a deferential review that weakens, and sometimes abrogates, constitutional protections.[277] Indeed, the Court's deference is "often so extensive as to raise the question whether judicial review is even applicable."[278] Nonetheless, the First Amendment remains justiciable, at least in theory.[279] For example, before the *Goldman* Court engaged in an unprecedented standard of defer-

270. *See id.* at 290 (Parker, J., dissenting).

271. *See General Media*, 131 F.3d at 290 (Parker, J., dissenting).

272. *See id.*

273. *See* Lamb's Chapel v. Center Moriches Union, Free Sch. Dist., 508 U.S. 384, 385 (1993).

274. *See* Post, *supra* note 183, at 1829 ("An important and unresolved question of public forum doctrine is whether the prohibition against viewpoint discrimination will override warranted deference.").

275. *See id.* at 1828. *Compare* Parker v. Levy, 417 U.S. 733 (1974) (reviewing merits of case before deferring to military judgement) *with* Goldman v. Weinberger, 475 U.S. 503 (1986) (complete deference without review on merits).

276. For a brief discussion of these cases, see *supra* notes 111-79 and accompanying text.

277. *See* Rostker v Goldberg, 453 U.S. 57, 70 (1981). Within the military, abstract government interests are deemed so critical as to alter the standard of judicial review. *See id.*

278. Dienes, *supra* note 111, at 799.

279. *See id.* at 804.

ence, Justice Rehnquist paid homage to the principle that the First Amendment limits military censorship.[280] *Goldman* highlights the Court's willingness to abrogate constitutional safeguards in favor of the military mission. Strong concurring and dissenting opinions, however, signal that *Goldman* may have been improperly decided and that the Court will continue to require a "reasonable relationship" between regulations of speech and military interests.[281]

A review of Supreme Court decisions indicate that the Court is more willing to defer to the military on matters that concern core military functions.[282] This approach comports with the notion that core military matters affect important internal management functions, and therefore, warrant close regulation similar to the internal management of speech.[283] Accordingly, in *Greer v. Spock*, the Court upheld a regulation requiring political activists to obtain permission from a base commander before demonstrating. The Court considered boosting military morale an internal management function.[284] Viewpoint discrimination is allowed when regulating internal speech.[285] Therefore, the *Greer* Court upheld the viewpoint-based restriction.[286]

Thus, the proper analysis for evaluating viewpoint-based speech restrictions in the military forum is: (1) whether the restricted speech attains an internal management function; and (2) whether it targets specific institutional goals.[287] At least one commentator has suggested that, when the relationship between the discrimination and the attainment of organizational goals is not immediately apparent, deference should not override the prohibi-

280. *See Goldman*, 475 U.S. at 509. Justice O'Connor noted in her dissent:

> The Court rejects Captain Goldman's claim without even the slightest attempt to weigh his asserted right to free exercise of his religion against the interests of the Air Force in uniformity of dress within the military hospital. No test for free exercise claims in the military context is even articulated, much less applied.

Id. at 531 (O'Connor, J., dissenting).

281. *See id.* at 510-33.

282. *Compare* Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (deferring to military regulation that governed discharge procedures, and challenged on Equal Protection grounds, because it had direct relationship to core military function of establishing military leadership) *with* Fonterio v. Richardson, 411 U.S. 677 (1973) (not deferring to military judgement concerning necessity of unequal benefit procedure because not related to "core military function").

283. *See* Post, *supra* note 183, at 1828.

284. *See* id. at 1829.

285. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 840 (1976) (upholding viewpoint regulation banning political speeches unapproved by base commander).

286. *See id.*

287. *See* Post, *supra* note 183, at 1832.

tion against viewpoint discrimination.[288] This determination involves significant fact-finding and post-hoc rationalizations will not suffice.[289] In *General Media*, the government did not meet this burden.

VI. IMPACT

The special needs of the military may impose constraints on First Amendment rights that would not be acceptable in civilian society, but there must be a meaningful justification for such additional constraints. When the military regulates speech on the basis of content, courts are clearly justified in deferring to the military mission. When the military regulates on the basis of viewpoint, however, courts should apply a more stringent First Amendment review. The military should be required to demonstrate a substantial justification for imposing significant burdens on freedom of expression, and the military's means must closely fit its objectives.[290]

Such a standard of review will provide much needed flexibility. Applying the rigid *Perry* public-forum analysis, with its flat prohibition against viewpoint discrimination in non-public forums, forces courts to characterize discrimination as based on either content or viewpoint. Because a content-based restriction permits circumvention of strict scrutiny in certain contexts, courts may characterize speech in a manner that will permit a deferential result. The *General Media* decision represents this type of situation.

Courts should be free to find viewpoint discrimination without fear of invoking the absolute ban on viewpoint discrimination. Rather, greater inquiry into the rationale and support for upholding a viewpoint-based prohibition should be dispositive. This more flexible approach would allow for interests to be balanced. Such a

288. *See id.*

289. *See General Media*, 131 F.3d at 294-95 (Parker, J., dissenting). Justice Parker agreed with the district court that there was no evidence on the record "to show that the actual sale or rental of sexually explicit material-as opposed to its possession-causes the alleged harm to the military's core values and appearance to the civilian world." *Id.* at 294. Justice Parker found inconsistency in the fact that cigarettes and alcohol are sold on military bases, yet the military certainly does not endorse smoking and drinking. *See id.* Additionally, Justice Parker suggested the military could always place a sign disclaiming approval of the sale of sexually lascivious materials. *See id.*

290. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57, 72-74 (1981) (upholding military registration regulation challenged on Equal Protection grounds after deferring to extensive national attention and public debate, report of Senate Armed Services Committee, hearings held by both houses, and various committees); Parker v. Levy, 417 U.S. 733, 740-41 (1974) (noting that district court relied on "the voluminous record of the military proceedings").

weighted balancing standard would amply protect military interests, and at the same time accommodate the vital principal of freedom of expression.

Dirk Simpson